

Undocumented Indonesian Migrant Workers, Solution or Omission

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Abstract—Not many alternative job, do not have skill and education, to get better wage and to improve the live are the reasons of Indonesian migrant workers to work abroad. Complicated prerequisites and procedure, expensive placement fee make Indonesian migrant workers to work without having official documents. Working by not having official document makes Indonesian workers vulnerable to become victims of apparatus extortion, inhumane treatment, deportation, and death. Country is constitutionally obliged to provide jobs for its citizens, country should be able to provide protection for Indonesian migrant workers and handle many cases involving Indonesian migrant workers who do not have official documents. This research uses normative legal research method with regulation and law approach. Remittance of Indonesian migrant workers can accelerate area development and improve the welfare of migrant worker family, but it is not comparable to the risk experienced by Indonesian migrant workers. The country has a responsibility for legal protection of Indonesian workers both within and outside the country, both with and without document. Legal protection for undocumented workers are by affirming the regulation of undocumented workers in law No. 18 of 2017, asserting that undocumented workers also have human rights which must be fulfilled, regulating non-discriminatory treatment to Indonesian migrant workers who experience the above-mentioned cases when abroad, simplifying placement procedure of Indonesian migrant workers, and attempt to negotiate the bilateral agreement.

Keywords— migrant workers, undocumented

I. INTRODUCTION

Increased population causes the rise in the number of job opportunity, while the number of available job opportunity is inversely proportional to the number of available worker thereby causes many unemployment. Educational standard and special skill demands become the prerequisites to get formal job. This situation makes workers who do not have the education and special skill to work abroad as solution. Economic factor resulting from the lack of job that encourage migrants to seek employment abroad.[1] The purposes are certainly to get job and increase welfare. Working on informal and domestic sectors abroad is a solution to obtain better life. More than 90% (61% are women).[2] of PMI work in domestic sector which has the risk of violences, victim of

economic, sexual exploitation, and often experiences discrimination treatment in workplace.

Placement procedures of Indonesian migrant workers (PMI) abroad have been regulated in Law No. 18 of 2017 on Protection of Indonesian Migrant Workers (PPMI). The Law PPMI explains the parties who are authorized to carry out the placement, prerequisites, and procedure which must be followed by the workers who work abroad. When Indonesian migrant workers who work abroad independently do not meet the existing prerequisites and the established procedure, then it means that they also do not have permission to work in foreign country and do not comply with the established procedures. The undocumented PMIs are widely found in Malaysia. The presence of undocumented PMI has certainly becomes the provision of Malaysia Immigration, which deports the undocumented.

Indonesian Government once adopted a policy of stopping the placement of migrant workers for Malaysia's destination. It turns out that the policy of placement termination of migrant workers has a negative impact such as the increasing number of migrant workers who entering illegally and the increasing number of deported workers from Malaysia. The moratorium policy itself has been regulated in Law No.18 of 2017 article 32 paragraph (1) which aims to protect migrant workers. The things that should be observed during the moratorium implementation for Malaysia the number of illegal workers sending has actually increased. This is certainly not the governmental goal, but when becoming migrant worker is solution to get out of poverty, the societies will take any action to work abroad. The next consequence of illegal procedures is the registration existence. According to data from the Indonesian Embassy in Kuala Lumpur, in 2010 there were at least 28. 745 migrant workers who were deported from Malaysia. The biggest deportations handled by BNP2IMW of East Java are from Madura. The Madura region which is one of the Indonesian migrant worker pockets with the main objectives of Malaysia and Saudi Arabia, the moratorium policy certainly has impact on people who want to work abroad. With their moratorium about 15-20 thousand workers who are usually sent to Saudi can not be sent. For that it should be analyzed whether placement termination policy of migrant workers needs to be done or not.[3]

In the provision of Article 28 D (paragraph 2) of 1945 Constitution (Amendment) "everyone is entitled to work ..." the article brings consequence for the country to provide legal protection to each of its citizens to obtain their rights, including PMI. This construction also applies without exception for both documented and undocumented PMI. Procedurally, undocumented PMI is not in accordance with the regulation. But it cannot be used as reason to not provide support and protection services for problematic undocumented PMI. In reality, the number of deportation of undocumented PMI in 2016 is increased, from 15,466 people in 2015 to 17,921 people in 2016. Working abroad is solution for undocumented PMI to improve their lives, but the increasing number of deported PMI becomes a question of how the country plays its role in the provision of protection for undocumented PMI. Malaysia still the main destination country for Indonesian migrant workers though there were a number of undocumented migrant workers and deportation.[4] Does the reality of undocumented PMI becomes solution for PMI or omission act of the government.

II. RESEARCH METHODS

The research was carried out by using empirical juridical research that examined the applicable legal provisions and what happened in reality in the community.[5] The approach taken in this study is a fact approach. The research data obtained from conducting the field by conducting interviews with PMI, assisting NGOs, the government funds law enforcement officials. Data analysis uses an inductive method, from data / facts to a higher level of abstraction, including also synthesizing and developing theories when needed and supporting data. So in the data analysis aims to organize the data that has been obtained. After the data from the field is collected with the data collection method described above, the data will be managed and analyzed using descriptive analysis.

III. RESULTS AND DISCUSSION

A. Migration Process of Indonesian Migrant Workers

Migration and development are still debated relating to whether migration encourages home country development or otherwise it hinders the development. In the light of the history that occurred in 1970-1980s, the failure of export-oriented industrialization (EO) and structural adjustment programs (SAP) strategies which are done by IMF and World Bank in third world country in Asia that results in economic crisis, the increase in foreign debt and unemployment rate which have final impact on the growing poverty.[6] To get out of this problem, many Asian people became migrant workers to the developing countries. Apparently this is quite helpful, at least it reduces the number of unemployment and increases the country income.

Phenomenon of international worker migration occurred since 1970s which has connection with economic rationality with the motivation to improve living condition. This is supported by government policy at that time which relies on economic development. This has led to inequality of

life between urban and rural communities. This inequality makes rural community with low educational standard migrate to other country in informal sectors with high salary if measured by rupiah value,[7] but when it is measured by existing standard in countries where they work, Indonesian migrant workers earn the lowest wage.

Everet Lee in 1966 said that the theory of international migration greatly influenced a person to migrate between countries, i.e.[8] (a) Low salary considerations in the country of origin, (b) Limited employment opportunities, (c) Low social access in the country of origin, (d) High salaries in the country of placement, (e) Little unemployment in the country of placement and (f) Habits of someone to wander.

Neoclassical theory is migration theory that focuses on push and pull factors which encourage people to migrate. Castells said briefly that this theory emphasizes the migration of densely populated place to less densely populated place or of low-income area to the place with fluctuate business cycle or high-income area.[9] The push factors are conditions in home country which become the reason to migrate in order to get better life, for example, natural disaster, political and economic instability, demographic growth, low living standard, low democracy. While the pull factors are the conditions in host country which look better than their home country and get people interested in going to such country, such as the country needs for worker, the level of better life, economic and political stability..

In the context of Indonesia, what is suitable with the Indonesian situation is the theory of migration conveyed by Everet Lee. Indonesian workers migrate because in Indonesia for the same type of work they get low salaries compared to abroad. Not only low salaries, Indonesian workers migrate because in Indonesia alone there are still very few workers so that Indonesian workers migrate because of the many job opportunities and the tendency of Indonesian workers to migrate.

The migration process begins by deploying the oriented worker as indentured service and the destination area is still around islands outside Java, especially Sumatra. In 1880, the Netherlands issued Koeli Ordinance (Ordinance on worker contract) which is published in the State Gazette No. 133 of 1880 on the grant of right legally to the plantation owner to punish rebellious and resisted labour. But the ordinance does not regulate the migration policy. While the rapidly growing migration flow is not only happened in Sumatra Island, but also in Malay Peninsula.[10] This is PMI initial placement to Malaysia. Data of the deployment of Indonesian migrant workers to Malaysia in 2014 until the end of October was 113,952 people (PUSLITFO BNP2PMI), Malaysia is main host country of Indonesian migrant workers. For the complaint of case reported to BNP2PMI (until the end of October 2014) was 688 cases, the second largest after Saudi Arabia. While the number of deported PMI through Nunukan until September 2014 has reached 2,773 people. The overall data of deportation in 2016 has reached 17,921 people: 2,954 illegal PMI and 14,928 overstayed PMI.

B. Indonesian Migrant Workers Placement Policy and Reality of Deportation

Applicable regulation concerns about migrant worker deployment policy is stipulated in Law No. 18 of 2017 (Law PPMI). PMI placement process consists of: pre-placement, while at the work place, and post-placement. The definition of migrant workers based on Law No. 18 of 2017 article 1 paragraph (2) of PMI is every Indonesian citizen who will, is or has done work by receiving wages outside the territory of the Republic of Indonesia. The provisions of this Law also regulate individual workers based on article 1 paragraph (4) of individual PMI, which is PMI working abroad without going through placement. Whereas Article 4 paragraph (1) PMI covers: PMI who works for employers with legal status, PMI who works for individual or household employers and seafarers and individual seamen. In contrast to Law No. 39 of 2004, the PPMI Law covers three processes namely will, being and after work are not focused when working abroad only. Recognition by the regulation of individual workers and the arrangement of ship workers.[11]

The PMI placement process includes before work, during work and after work. Before work begins with the fulfillment of the PMI requirements stipulated in article 5 of the PPMI Law, namely: at least 18 years old, competent, physically and physically healthy, registered and have a social security membership number and have the complete required documents. The five requirements must be fulfilled by prospective PMI before working abroad. The reality of the cases that occur in migrant workers is that they do not meet one or even all of the prerequisites so that migrant workers work abroad do not pass the receipt procedures and do not have the required documents. Regarding this document, some from Indonesia do not have complete documents, that is, they only have a passport without a work visa. This is common in Malaysia, with many Indonesian migrant workers working without official documents. PMI who does not have a work visa or passport is the target of the Malaysian police to be arrested and will be returned to Indonesia. Even the Malaysia Government sometimes does a policy to provide a legal document, namely conducting a large-scale inspection of all foreign workers who work in Malaysia without procedures and documents official. At this time many PMI deportations were carried out from Malaysia to Indonesia.

PMI is vulnerable to deportation. Deportation is carried out by the government of Malaysia to migrant workers who do not have official documents such as passport and work permit. Documented migrant workers are migrant workers who work in Malaysia by following the government-recognized formal procedure to gain status as legal workers and have official documents: travel document and work visa. While undocumented migrant workers are migrant workers who work in Malaysia without having necessary documents to obtain status as legal migrant workers. Some of them do not have work visa, travel document, and overstayed passport.[12] Things which make migrant workers do not have official documents are: (a) Complicated, slow, impracticable, and

expensive legal migration procedures, (b) Immigration requirement of Malaysia which places the migrant workers at specific employer, (c) Bad working condition or like slavery, (d) Memorandum of understanding (MoU) which allows employer to hold their passports and (e) The lack of information for potential migrant workers about working procedure and condition abroad.

PMI deportation reality cannot be avoided because it is associated with the jurisdiction of Malaysia. General regulation relating to employment act of Malaysia is stipulated in the Employment Act 1955 and Amendment of Employment Act 2012 which has not been set up specifically about the Household Employees (PRT). Employment Act 1955 only recognizes that domestic PMI rights are limited to contract completion. If the change to Article 57 in Amendment of Employment Act 2012 can be implemented properly, thereby it can help to detect the existence of PMI domestic. Starting from when they began to work with particular employer, and to know when domestic sector PMI stop working, or run away from their employers, so if there is a problem in domestic sector, RI representatives can easily provide protection.

Immigration Act 1952/1959/2002 of Malaysia does not much discuss about the protection of domestic sector PMI. The enactment of this rule makes PATI or undocumented PMI will be deported and get flogging. Malaysia considers undocumented PMI as illegal immigrants and Malaysia also does not want to know PMI reasons for not having the document. This leads to injustice for PMI because not all undocumented PMI are illegal immigrants, however there are several PMI who initially have the documents but their documents or passports are owned, held or seized by their employers which causes them to not have any documents.

There are approximately 700,000 undocumented migrant workers and 70% of them come from Indonesia. Due to the increased number of undocumented migrant workers, the government of Malaysia implements deportation policy by deploying special police "RELA". Migrant workers can be easily imprisoned because they do not have the documents, besides, they also experiences bad treatment while in prison. In this deportation process, the government of Malaysia arrests, imprisons, and repatriates the migrant workers.

C. Position of the Government of Indonesia to Deported PMI

Indonesia as part of the world community and as a member of the ILO has a moral obligation to implement international provisions to be applied in the practice of industrial relations in Indonesia. In the International Convention which has been ratified as Law No. 6 of 2012 concerning Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, it can be seen in article 10 of the Migrant Convention that; "No migrant worker and his family member may be subjected to torture or inhuman treatment or punishment which is degrading" [13].

From this article, it can be seen that Indonesia fully supports what has become an agreement on the Migrant

Workers Convention. So that it was later ratified and made into law. Also bearing in mind that the Migrant Workers Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Considering that the aim of the ILO, as stated in its Constitution, is to protect the interests of workers when they are employed in countries that are not their own, and bear in mind the expertise and experience of the organization in matters relating to migrant workers and members of their families.[13]

In fact, undocumented migrant workers are also beneficial for Malaysia because some employers hire them with low wage. The government of Malaysia also understands such matter and protect the employer of Malaysia. It can be seen from deportation action which is done with regular cycle every time after harvest or field work is completed.[12] Deported migrant workers will be sent to several border areas such as: (a) Through ports in Riau Island, (b) Through Tanjungpinang and Tanjung Uban in Riau or Batam Islands and (c) Nunukan. Deportation does not make migrant workers "give up" to return to Malaysia and become undocumented migrant workers again. Many migrant workers arrive in Tanjung Pinang, then they are released by authority of Indonesia. However, they will re-enter Malaysia in many ways.

When Malaysia implements deportation policy, the government of Indonesia also has the responsibility to receive and send the migrant workers to their respective areas. The problem of deported migrant worker handling is happened in Nunukan, thereby resulting in victim. Until now, deported migrant workers in Tanjungpinang are not directly repatriated, but they have to wait certain time schedule. Furthermore, this repatriation procedure causes all migrant workers should be sent to Jakarta first and then to their respective areas. [14]

Migrant worker deportation policy is not appropriate for the governments of Malaysia and Indonesia. This policy is only repressive action to reduce the number of undocumented migrant workers. Therefore preventive and permanent policy is needed, and the policy should not violate the human rights of migrant workers. Position of the government of Indonesia in PMI protection abroad makes the Government responsible for PMI, this is contained in Article 7 and 8 of Law PPMI. It is also affirmed that prospective PMI or PMI is entitled to get protection under the regulation and law, since pra-placement, placement, and until post-placement pursuant to Article 21-28 of Law PPMI. Overall, Articles 77 – 84 regulate the government guarantee to provide protection during the processes of pre-placement, when in the host country, and post-placement. This confirms that PMI protection while working in the host country until they return to Indonesia is legally guaranteed by the government of Indonesia. Article 31-36 regulates the forms of protection as PMI, namely legal, social and economic protection carried out by the local government, regional governments and village governments.

The absence of provision in Law PPMI which specifically regulates PMI deportation handling especially to

prevent people from working in non-procedural, makes many deported PMI get back to Malaysia. Policy is needed not only to repatriate PMI to their regions of origin, but the understanding about official procedure to prospective PMI and concrete policy relating to alternative of other employment opportunity in the area. Another crucial thing is Law PPMI provides protection to PMI who through the official procedure, then it means that illegal PMI is not protected. Therefore, it must be strictly regulated that the country has an obligation to protect procedural and non-procedural PMI.

Country protection to its citizens abroad is stipulated in Article 18 of Law No. 37 of 1999 on Foreign Relations. In connection with this, Article 21 of Law PPMI provides limit of KBRI/KJRI in providing protection to PMI when they are in the host country, which is not contrary to the provision of regulation and law in the host country and international law and practice. If in a country that has a labor attaché, then that authority is exercised by the labor attaché.

Implementation of country obligation to provide protection to its citizens who are outside the territorial jurisdiction is generally set in country national law. There are limitation and restriction set forth in generally accepted international law. It has become the general principles of International Law. The diplomat may protect its citizens in other country due to nationality connection. The nationality is connector between citizens and country.[15] The existence of deportation policy in immigration provision causes the government of Malaysia has the right and authority to regulate and control the number of illegal migrant workers. In terms of country jurisdiction, the above mentioned is reasonable thing but it becomes a problem if there is indication of human rights violation in the deportation process.

It has been known that PMI who works abroad is experiencing various kinds of violence while in the host country. Therefore, it is important to provide legal protection based on the principles of international law, because when it comes to jurisdiction outside PMI home country, then their national law cannot be immediately used. This is excluded if bilateral agreement between relevant countries regarding such matter is made. There is Mou Protocol 2011 between the governments of Indonesia and Malaysia, but it is deemed not maximal in protecting PMI.

In this regard, referring to the third source of international law, namely the general principles of law recognized by civilized nations, it is legal principle which underlies the modern legal system[16] and relating to PMI legal status while in host country, there are principles of international law governing the provisions associated with PMI legal status, including the rights and legal protection guarantee under the principles of international law. As mentioned before, PMI cannot immediately use the national law when they are outside the territorial jurisdiction of Indonesia.

In addition, by knowing their rights and legal protection guarantee, it can prevent the occurrence of

discriminatory treatment by citizens in the host country, either sexual or physical violence, and employment protection. The following will describe the principles of territorial jurisdiction and country treatment standard, as benchmark for PMI in acquiring their rights and legal guarantee, based on the principle of international law which applicable to each individual when they are in the host country. Foreigner in the host country experiences the confusion of legal status as stated by Brownlie[17] that foreign responsibility while in the host country often experiences conflict between legal interest in the home country and the law of host country.

IV. CONCLUSION

The conclusions that can be drawn from this research are: there has been PMI placement rule in the provision of Law No. 18 of 2017. This Law has not contained the provision governing the prevention and handling of PMI deportation. And it should be emphasized that the government must provide protection to procedural and non-procedural PMI. In providing protection there should be no difference in treatment between documented and undocumented migrant workers, because the standard of providing protection for Indonesian citizens is based on basic rights to obtain employment and a decent living for humanity. When the government is unable to provide jobs, becoming a PMI is a solution. The government must strive to facilitate the placement process in order to reduce undocumented PMI. Concrete policy relating to the alternative of other employment opportunity in the area is needed. Deportation policy is the policy of the government of Malaysia, Indonesian workers are required to obey it. But the government of Indonesia is expected to act decisively if there is human rights violation in the deportation process.

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